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## THE EXERCISE OF THE PARDONING POWER IN THE PHILIPPINES.

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The general amnesty proclaimed by President Roosevelt at the close of the insurrection in the Philippines was confined to offenders who had not been convicted by a court of competent jurisdiction. Persons undergoing punishment pursuant to the sentence of a judicial tribunal were invited by the amnesty proclamation to make application for individual pardon. A large number of such applications were filed with the civil and military authorities. The military authorities declined to consider these applications, taking the position that the establishment of civil government, pursuant to Congressional legislation, deprived the military administration of jurisdiction in such matters. The civil authorities were not certain of their authority to deal with these applications, for the Act of Congress providing for civil government in the Philippine Islands did not specify by whom or in what way the power to pardon should be exercised.

The questions involved were referred to the War Department, and Secretary Root determined the several questions involved as follows. (Unpublished letter from Secretary Root to Gov. Taft, filed, Insular Bureau, War Department.)

1. The Civil Governor of the Philippine Islands is authorized to exercise the power to grant pardons, reprieves and commutations

of sentence in cases involving offenses against the laws of the Civil Government of the Philippine Islands.

2. The Civil Governor is authorized to exercise a like authority as to convictions and sentences imposed by military commissions and provost courts in the Philippine Islands in all cases wherein the record does not disclose affirmatively, that the offense on which the conviction was secured was an offense against the laws of war.

3. The Civil Governor in the exercise of said authority shall act—By Authority of the President of the United States.

4. The authority of the Civil Governor to exercise said power does not extend to offenses tried by courts-martial; nor to offenses against any of the general statutes of the United States which may be in force in the Philippine Archipelago.

5. All pardons granted by the Civil Governor shall be reported to the Secretary of War for presentation to the President.

These conclusions of Secretary Root are so manifestly in harmony with common sense and judgment, that they do not need to be sustained by argument when considered from the standpoint of a layman. Their justification in law arises from a sequence of events and continued operation of governmental powers, the recital of which is not without interest to the student of law.

The termination of the Philippine insurrection being accomplished and proclaimed the government of the islands is no longer to be administered by exercise of the rights of a belligerent. The authority derived from the laws of war and the fact of military occupancy of hostile territory terminated when the conditions of peace were officially proclaimed as existing in the archipelago. In the absence of Congressional legislation, the government instituted by exercise of the war powers of the nation would continue as a *de facto* government, but would not continue to exercise the unlimited authority emanating from military necessity or belligerent right. In *Dooley v. United States*, 182 U. S. 222, the court held (Syllabus) :

“Duties upon imports from the United States to Porto Rico, collected by the military commander and by the President as Commander-in-Chief, from the time possession was taken of the island until the ratification of the treaty of peace, were legally exacted under the war power. As the right to exact duties upon importations from Porto Rico to New York ceased with the ratification of the treaty of peace, the correlative right to exact duties upon imports from New York to Porto Rico also ceased at the same time.”

Respecting the affairs of civil government of territory subject to the sovereignty of the United States, the President, in time of peace, does not exercise the authority of his powers as Commander-in-Chief of the Army and Navy. He exercises the authority of his powers as Chief Magistrate, conferred by our governmental policy or by Congressional action. Among other powers possessed by the President as Chief Magistrate is that of granting pardons and reprieves for offenses against the national authority.

In *United States v. Wilson*, 7 Peters 160, Chief Justice Marshall said:

“A pardon is an act of grace, *proceeding from the power entrusted with the execution of the laws*, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”

At present “the power entrusted with the execution of the laws” in the Philippine Islands is the Civil Government provided by the Act of Congress approved July 1, 1902.

The power to pardon is not created by constitutional provision or legislative enactment. It is one of the constituent powers of sovereignty. The agency by which it is to be exercised may be created or designated by the constitution or statute, but the power exists prior to adoption of means for its exercise. The existence and exercise of this power are so universally recognized and received as to have become part and parcel of our system of government. The cases in which this power is exercised may be divided into two general classes. The first class includes instances wherein the exercise is had without regard to the merits or demerits of the individuals affected, but is predicated upon the purposes and desires of the sovereign: such, for instance, as the celebration of a festival; or the promotion by grants of amnesty, of political and state endeavors. The second class includes those instances wherein the exercise of the pardoning power results in whole or in part from the merits or rights of the individual affected; such, for instance, as cases wherein the innocence of a convicted person is established; or the injustice of a sentence, imposed by a court, is made to appear.

The grant of a pardon in a case included in the first of these two classes is clearly an act of grace. Under the sovereignty of the United States and as to offenses against the national authority, the power by which the grace is conferred is to be exercised by the President. The Constitution gives to the President, in general terms, “the power to grant reprieves and pardons for offences against the United States.”

The Philippine Islands are now governed by the national authority of the United States operating directly, that is, without an intermediary governmental authority, within the territory and upon the inhabitants. The existing Government of the Philippine Islands is an instrument wherewith the United States exercises certain of its powers in that locality. The laws in force in the islands whether of Spanish origin or not, are now laws of the United States for that territory; and the enacting clause of the laws enacted by the present government of the islands is required to be—"By authority of the United States be it enacted by the Philippine Commission."

It follows that a violation of any of these laws, since the date the military occupancy was established, is an offense against the United States. The authority to exercise the pardoning power respecting such offenses is conferred upon the President by the Constitution.

If all pardons are to be considered acts of grace granted by exercise of prerogative right and without reference to the merits or demerits of the beneficiaries, the question arises—Must the President exercise the power personally or may the will of the President be determined and declared by a subordinate official of the Executive branch of the Government of the United States?

In *Jones v. United States*, 137 U. S. 202, 217, the court say:

"The power, conferred on the President of the United States by section 1 of the Act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President."

In *Runkle v. United States*, 122 U. S. 543, the court considered the authority of the Secretary of War to declare the will of the President respecting the proceedings, findings and sentence of a court-martial. Therein the court say (p. 557):

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of

business, are presumptively his acts. That has been many times decided by this court. *Wilcox v. Jackson*, 13 Pet. 498, 513; *United States v. Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States v. Farden*, 99 U. S. 10, 19; *Wolsey v. Chapman*, 101 U. S. 755, 769.

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offence with which he has been charged, and for which he has been tried. In this connection the following remarks of Attorney-General Bates, in an opinion furnished President Lincoln, under date of March 12, 1864, 11 Opinions Attorneys-General, 21, are appropriate:

"Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the

solemnity and significance of the judgment of a court of law."

The rule laid down by Bouvier's Law Dictionary is as follows (see Executive Power, Vol. 2, p. 720):

"Executive acts, as to the manner of doing which there is no provision of law, may be done through the head of the proper department whose acts are the acts of the President in contemplation of law. . . . With respect to certain executive functions which spring from the legislation of a law, the authority of the legislature is ended, and the uncontrolled discretion of the executive attaches and is exercised independently of the other departments of the government. In the exercise of such powers the discretion of the subordinate officer, within his sphere, is the discretion of the President. Of this character are the control of the military resources of the government; *the pardoning power* and the power of appointment, all of which are dormant until legislation has been enacted for creating an army and navy or defining crimes and punishment and the creation of offices."

Under the foregoing rule, since Congress has not prescribed a procedure to be followed in determining as to grants of pardon, it would be competent for the Civil Governor of the Philippine Islands to determine and declare the will of the President in the exercise of "the power to grant reprieves and pardons for offenses against the United States" committed in the Philippine archipelago; *provided*, the President assents to such action by the Civil Governor.

The assent of the President was evidenced by the following official communication passing from the Secretary of War to the Civil Governor of the Philippine Islands while the island continued subject to the laws of military occupancy:

"July 5, 1901.

Taft,

Manila:

" \* \* \* Power to pardon offenders convicted by civil courts is vested in Civil Governor.

ELIHU ROOT,

"Secretary of War."

Under Spanish sovereignty in the Philippine Islands the pardoning power resided in the Spanish Crown. If we consider the right to exercise that power as being a crown prerogative, it follows that said prerogative did not pass to the United States nor to its officers by virtue of the military occupancy.

In his opinion as to the construction of sewers and pavements in Havana, communicated to the Secretary of War, July 10, 1899, Attorney-General Griggs said (22 Op. 527):

"By well settled law, upon cession of territory by one nation to another, either following a conquest or otherwise . . . those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon transfer of sovereignty. Political and sovereign rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. . . . The authority of the power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of the treaty of cession or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide."

In *Pollard's Lessee v. Hagan*, 3 How. 225, the court say:

"It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to execute them."

In the cases included in the second class, being instances wherein the pardoning power is exercised with reference to the rights and merits of the beneficiary, the grant of a pardon is not an act of grace, it is an act of justice. It is not predicated on the wish or whim of the sovereign, but is based on the right of the individual to even and exact justice; a right which no sovereign is at liberty to deny. There is no court of equity in criminal jurisprudence; yet the criminal law and procedure, by reason of its general character and want of flexibility, often work individual injustice. The exercise of the pardoning power is the only means available for meeting this constantly recurring evil, and its exercise for that purpose is so universally recognized and established as to give it a quasi-judicial character. Viewed in this light, the exercise of the power becomes a part of the procedure by which justice is attained in the administration of the criminal laws, and may be provided for by the authority which prescribes the laws and the means and methods for their enforcement. In harmony with this doctrine, is the action of Congress in adopting the 112th Article of War, which is as follows (U. S. Rev. Stats. p. 240):

"Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer. Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge."

In exercising the authority conferred by the foregoing Article, the act of the military commander is not declaratory of the will of the President or the Commander-in-Chief of the Army and Navy. It is the act of the officer who performs it and derives its authority from the Congressional enactment. This enactment has never been challenged as violating the constitutional provision giving to the President "the power to grant reprieves and pardons for offences against the United States."

The doctrine that the pardoning power, when exercised with reference to cases which turn on the rights or merits of the individual, may be considered as an instrumentality of criminal procedure, is evidenced by the laws and established usage of the States of the Union. In a majority of our States the authority to exercise the pardoning power is conferred upon the Governor by the State Constitution; yet a number of these States have what is known as "good time" statutes, under which a convict may diminish the term of his imprisonment, as fixed in his sentence, by good behavior in prison. In a number of the States the Constitution permits the authority to pardon to be exercised by a Board of Pardons; and in some States the power is made operative by statutes providing for indeterminate sentences, whereby the duration of the imprisonment depends upon the conduct and character of the prisoner.

If the doctrine be accepted, that the pardoning power as to offences in the Philippine Islands which are not military but are violations of the penal laws regulating the relations which the inhabitants sustain to each other and the communities in which they live, is an instrumentality for the efficient administration of those laws and of the civil government, then the authority to exercise said power resides in the Civil Governor of the Islands as the chief executive of the government entrusted with the execution of the laws in that territory.

The government of the Philippine Islands is autonomous but not sovereign. It is similar in character to that of a Territory. In *Talbott v. Silver Bow County*, 139 U. S. 446, the court speaking by Mr. Justice Brewer, with reference to a Territory, say:



"It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the General Government is no more independent than that of a city to the State in which it is situated, and which has given to it its municipal organization."

The exercise of the pardoning power in the organized Territories of the United States was provided for in each of the several organic acts. The rule thus established was incorporated into the Revised Statutes of the United States as section 1841, as follows:

"Sec. 1841. The executive power of each Territory shall be vested in a governor, who shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. . . . He may grant pardons and reprieves, and remit fines and forfeitures, for offenses against the laws of the Territory for which he is appointed, and respites for offenses against the laws of the United States, till the decision of the President can be made known thereon. . . ."

The Act approved April 12, 1900, providing a civil government for Porto Rico (13 Stats. 81), contains the following:

"Sec. 17. That the official title of the chief executive officer shall be 'The Governor of Porto Rico.' . . . He may grant pardons and reprieves, and remit fines and forfeitures for offenses against the laws of Porto Rico, and respites for offenses against the laws of the United States, until the decision of the President can be ascertained."

Conceding the proposition that the Government of the Philippine Islands has no powers excepting those conferred upon it, it becomes necessary to consider that the powers already conferred are far reaching and extraordinary. That government was created, installed and maintained for a period, by the United States in the exercise of belligerent right in territory subject to military occupancy. Such a government possesses and may exercise all the powers and functions of government essential to the maintenance of peace and order and the accomplishment of the purposes for which it is instituted.

In *New Orleans v. Steamship Company*, 20 Wall. 394, the court say:

"In such cases the conquering power has the right to displace the preexisting authority and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint

all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases, save those which are found in the laws and usages of war."

Under the laws and usages of war, in territory subject to military occupancy, the penal laws of the country continue in force, but the administration of said laws devolves upon the occupying military force and the authority by which such administration is effected passes to the commander of the occupying forces.

The Spanish penal code and criminal procedure were continued in force in the Philippine Islands under the American military government, and remained in force until displaced by the recent enactments of the Philippine Commission. The authority to administer and execute said laws, theretofore exercised by the Spanish officials, passed to the Commander of the occupying forces to be thereafter exercised by him or such persons as he should designate.

The Spanish system of laws contemplates that mitigation of sentences will be required in order to correct injustice resulting from the inequitable operation of the criminal laws and provision is made under which the courts participate in the exercise of the power of commutation. The reviewing court in cases on appeal "for violation of law or breach of form" in the trial proceedings, is required to comply with the provisions of Article 953 of the Law of Criminal Procedure:

"Art. 953. When it shall be declared that the appeal does not lie upon any grounds, the chamber shall order the record to be transmitted to the fiscal, and in view of the opinion of the latter and the merits of the case, if it should find any ground of equity to advise that the final sentence be not executed, it shall recommend to His Majesty through the Colonial Minister, the commutation of the penalty."

The Spanish Law of Criminal Procedure provides for what is called "The Appeal for Review." This is a proceeding to secure the annulment of unjust sentences in certain cases, and contemplates the exercise by the court of the authority by which pardons are granted by reason of the rights of the individual under sentence. From the Spanish Law of Criminal Procedure, I quote as follows:

"Art. 954. An appeal for review shall lie from final sentences in the following cases:

"1. When two or more persons are serving a sentence by virtue of contradictory sentences for the same crime which could not have been committed by more than one person.

"2. When a person is serving a sentence as the principal, accomplice, or accessory to the homicide of a person whose existence is established after the sentence.

"3. When a person is serving a sentence by virtue of a judgment the grounds for which may have been a document afterwards declared false by a final sentence in a criminal cause."

"Art. 955. An appeal for review may be taken by the persons punished and by their spouses, descendants, ascendants, and brothers and sisters by applying to the Colonial Minister with a petition setting forth the grounds therefor."

"Art. 959. The appeal for review shall be conducted by hearing the *fiscal* once only in writing and the persons punished another time, who must be cited, should they not first appear. When they request the attachment of documents to the record, the chamber shall order what it may deem proper hereon. Thereupon the appeal shall follow the procedure prescribed for an appeal for annulment of judgment for violation of law, and the chamber shall, with or without oral argument, as it may order in view of the circumstances of the case, render sentence, which shall be irrevocable."

"Art. 961. Even though the person punished shall have died, his widow, ascendants or descendants, legitimate, legitimized, or natural acknowledged, may request a review of the action for any of the causes mentioned in article 954 for the purpose of rehabilitating the memory of the decedent and for the punishment of the real culprit in a proper case."

The authority to administer the foregoing provisions of the Spanish Code passed to the Military Governor by virtue of the laws of military occupancy. The Military Governor might exercise the authority himself or confer the right to exercise it in his name upon whom he saw fit. All the powers of the judicial branch passed to the commander of the occupying force, who redistributed the authority to exercise them and might authorize their exercise by the courts or by other agencies, as his discretion determined.

The same is true in respect of the authority to exercise the pardoning power, in so far as that authority is considered an instrument for the efficient and proper administration of the penal laws regulating the relations sustained by the inhabitants to each other and to the communities in which they live. This authority con-

tinued to reside in the Military Governor until transferred to the Civil Governor by the following order (see Report of the Sec. of War 1901, pp. 58-59):

"War Department, Washington, June 21, 1901.

"On and after the 4th day of July, 1901, until it shall be otherwise ordered, the president of the Philippine Commission will exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines, and to that end the Hon. William H. Taft, president of the said commission, is hereby appointed civil governor of the Philippine Islands. Such executive authority will be exercised under and in conformity to the instructions to the Philippine Commissioners dated April 7, 1900, and subject to the approval and control of the Secretary of War of the United States. The municipal and provincial civil governments which have been or shall hereafter be established in said islands, and all persons performing duties appertaining to the offices of civil government in said islands, will in respect of such duties report to the said civil governor.

"The power to appoint civil officers, heretofore vested in the Philippine Commission or in the military governor, will be exercised by the civil governor with the advice and consent of the commission.

"The military governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties hereinbefore described, but his authority will continue to be exercised as heretofore in those districts in which insurrection against the authority of the United States continues to exist or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions to the commission dated April 7, 1900.

"By the President.

"ELIHU ROOT, *Secretary of War.*"

The Act of Congress, approved July 1, 1902, entitled "An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes" provides as follows:

"That the action of the President of the United States . . . in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the powers of government to the extent and in the manner and form set forth in the Executive order dated June twenty-first, nineteen hundred and one . . . is hereby approved, ratified and confirmed. . . ."

If the Military Governor of the Philippine Islands had authority to pardon offences against the laws administered by the civil side of the military government, then Congress authorizes the exercise of that authority by the Civil Governor of the Islands.

A cursory reading of the 112th Article of War (*ante*), might induce a belief that the military commander acting as military governor exercises the pardoning power as to offences against the laws of the civil side of the military government, by virtue of that Article, in which event the authority would not pass to the civil governor, but careful consideration induces the belief that the authority conferred by that Article is confined to offences triable by courts-martial, to wit: offences against the laws of war, the Articles of War and the Rules for the discipline of the Army.

Under military government the commander of a belligerent force may administer the affairs of that government as his judgment approves and prudence dictates. This broad authority would not pass to a civil governor and could not be exercised by the Civil Governor of the Philippine Islands under the condition now existing.

Reference has been made, in another connection, to the declaration of the Secretary of War that "power to pardon offenders convicted by civil courts is vested in Civil Governor." At the time this declaration was made, July 5, 1901, the government of the Philippine Islands continued to be subject to the exercise of belligerent right. While the national authority of the United States in the Philippine Islands continued to be exercised by belligerent right, the legislative powers of the nation respecting the internal and domestic affairs of the islands were exercised by the President as Commander-in-Chief of the Army and Navy, with equal authority and effect as are the exercises of legislative authority by Congress in time of peace. If this declaration of Secretary Root is to be considered as an executive exercise of the legislative power, *verb sap.* the pardoning power is vested in the Civil Governor of the Islands. It will be noticed that said declaration was communicated to Governor Taft on July 5, 1901. This was the day following the date when the order of June 21, 1901, became operative and completed the transfer of the executive power in pacified districts from the Military Governor to the Civil Governor. It is certainly proper to consider said declaration as explanatory of the general terms of the order of June 21, 1901, and that said order as so explained is "approved, ratified and confirmed" by the Act of Congress of July 1, 1902, and is now of the same binding force and effect as though said declaration were recited in full in the Act of Congress.

A large majority of the convicted individuals now seeking pardon or commutation of sentence, were tried and convicted by military commissions or provost courts created by the military government, but that does not interdict the exercise of the power to pardon by the civil governor. Military commissions and provost courts are created for the general purpose of enforcing the local laws as to offenses committed outside of the territorial jurisdiction of existing civil courts by the non-combatant inhabitants of the country. They also possess jurisdiction over offenses against the common law of war. They are agencies of the civil side of military government and their jurisdiction does not extend to matters and persons subject to the Articles of War and the rules adopted for the discipline of the Army. Offences against those Articles and rules are triable by courts-martial and as to sentences imposed by courts-martial the pardoning power or the power of commutation could not be exercised by the civil governor. The test of the right to exercise the authority is the character of the offence and jurisdiction over the person of the offender, instead of the character and jurisdiction of the tribunal by which the trial was had and sentence imposed.

*Charles E. Magoon.*